

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Oct 24, 2023

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ASHLEAH H.,

Plaintiff,

v.

KILOLO KIJAKAZI,
ACTING COMMISSIONER OF
SOCIAL SECURITY,

Defendant.

No. 2:22-CV-00323-ACE

ORDER GRANTING DEFENDANT'S
MOTION TO AFFIRM

ECF Nos. 13, 19

BEFORE THE COURT is Plaintiff's Opening Brief and the Commissioner's Brief in response. ECF No. 13, 19. Attorney David L. Lybbert represents Plaintiff; Special Assistant United States Attorney Katherine B. Watson represents the Commissioner of Social Security ("Defendant"). After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Defendant's motion to affirm the decision of the Commissioner and **DENIES** Plaintiff's motion to reverse.

JURISDICTION

On July 15, 2019, Plaintiff filed an application for Supplemental Security Income alleging disability since April 1, 1996, due to sclerosis, skeletal dysplasia, and anxiety. Tr. 272, 297. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) Jesse K. Shumway held a

1 hearing on December 15, 2021, Tr. 77-116, and issued an unfavorable decision on
2 January 12, 2022, Tr. 12-38. The Appeals Council denied Plaintiff's request for
3 review on November 2, 2022. Tr. 1-6. The ALJ's January 2022 decision thus
4 became the final decision of the Commissioner, which is appealable to the district
5 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action for judicial review
6 on December 22, 2022. ECF No. 1.

7 **STATEMENT OF FACTS**

8 Plaintiff was 4 years old on the alleged disability onset date, April 1, 1996,
9 and 27 years old on the disability application date, July 15, 2019. Tr. 272.
10 Plaintiff's disability report indicates she completed the 12th grade in school in
11 2010, Tr. 298, worked part-time as a waitress for less than a year in 2010/2011, Tr.
12 298, and stopped working on January 1, 2011, because of her conditions, Tr. 297.
13 She testified at the administrative hearing on December 15, 2021, that she was not
14 able to continue to work as a waitress because the job duties caused pain and tears.
15 Tr. 97. Plaintiff experienced daily pain and spasms in her upper, lower and mid-
16 back. Tr. 100. She stated she also had issues with her feet and ankles, had general
17 headaches about once a week, had two to three migraine headaches per month,
18 took medication for anxiety and depression, and had a poor memory. Tr. 102-104.

19 Plaintiff indicated she could stand for 35 to 40 minutes at a time, Tr. 101,
20 walk less than a block at one time, Tr. 107, and sit for 45 minutes at a time, Tr.
21 101. She stated she is typically in a resting posture for more than 50% of the day.
22 Tr. 107.

23 **STANDARD OF REVIEW**

24 The ALJ is tasked with "determining credibility, resolving conflicts in
25 medical testimony, and resolving ambiguities." *Andrews v. Shalala*, 53 F.3d 1035,
26 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with
27 deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*,
28 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed

1 only if it is not supported by substantial evidence or if it is based on legal error.
 2 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is
 3 defined as being more than a mere scintilla, but less than a preponderance. *Id.* at
 4 1098. Put another way, substantial evidence “is such relevant evidence as a
 5 reasonable mind might accept as adequate to support a conclusion.” *Richardson v.*
 6 *Perales*, 402 U.S. 389, 401 (1971), quoting *Consolidated Edison Co. v. NLRB*, 305
 7 U.S. 197, 229 (1938). If the evidence is susceptible to more than one rational
 8 interpretation, the Court may not substitute its judgment for that of the ALJ.
 9 *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Social Sec. Admin.*, 169 F.3d 595,
 10 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or
 11 if conflicting evidence supports a finding of either disability or non-disability, the
 12 ALJ’s determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230
 13 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be
 14 set aside if the proper legal standards were not applied in weighing the evidence
 15 and making the decision. *Brawner v. Sec'y of Health and Human Servs.*, 839 F.2d
 16 432, 433 (9th Cir. 1988).

17 **SEQUENTIAL EVALUATION PROCESS**

18 The Commissioner has established a five-step sequential evaluation process
 19 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *Bowen v.*
 20 *Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four the claimant
 21 bears the burden of establishing a prima facie case of disability. *Tackett*, 180 F.3d
 22 at 1098-1099. This burden is met once a claimant establishes that a physical or
 23 mental impairment prevents the claimant from engaging in past relevant work. 20
 24 C.F.R. § 416.920(a)(4). If a claimant cannot perform past relevant work, the ALJ
 25 proceeds to step five, and the burden shifts to the Commissioner to show (1) that
 26 Plaintiff can perform other substantial gainful activity and (2) that a significant
 27 number of jobs exist in the national economy which Plaintiff can perform. *Kail v.*
 28 *Heckler*, 722 F.2d 1496, 1497-1498 (9th Cir. 1984); *Beltran v. Astrue*, 700 F.3d

1 386, 389 (9th Cir. 2012). If a claimant cannot make an adjustment to other work in
2 the national economy, the claimant will be found disabled. 20 C.F.R. §
3 416.920(a)(4)(v).

4 **ADMINISTRATIVE DECISION**

5 On January 12, 2022, the ALJ issued a decision finding Plaintiff was not
6 disabled as defined in the Social Security Act.

7 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
8 activity since July 15, 2019, the disability application date. Tr. 17.

9 At step two, the ALJ determined Plaintiff had the following severe
10 impairments: scoliosis status post surgical fusion, degenerative disc disease of the
11 lumbar and cervical spine, skeletal dysplasia, obesity, fibromyalgia, and anxiety
12 disorder. Tr. 17.

13 At step three, the ALJ found Plaintiff did not have an impairment or
14 combination of impairments that meets or medically equals the severity of one of
15 the listed impairments. Tr. 18.

16 The ALJ assessed Plaintiff's Residual Functional Capacity (RFC) and found
17 Plaintiff could perform light exertion level work with the following limitations:
18 she can stand and walk for 2 to 4 hours total in combination in an 8-hour workday;
19 she requires the option to stand and stretch at the workstation for 1 to 2 minutes
20 after every 30-40 minutes of sitting; she cannot climb ladders, ropes or scaffolds;
21 she cannot kneel, crouch, or crawl; she can occasionally perform all other postural
22 activities, such as climbing ramps and stairs, stooping, and balancing; she can
23 occasionally rotate her torso; she can frequently reach with the bilateral upper
24 extremities; she can frequently push and pull with the bilateral upper extremities;
25 she cannot have concentrated exposure to extreme cold; she can tolerate no more
26 than moderate noise levels; she can have no exposure to vibration or workplace
27 hazards (e.g., unprotected heights or moving mechanical parts); and she is limited
28 to simple, routine tasks. Tr. 22.

At step four, the ALJ indicated that a finding about the capacity for past relevant work was not made because all potentially applicable Medical-Vocational Guidelines would direct a finding of “not disabled” given the individual’s age, education, and residual functional capacity; therefore, the ALJ found this information was not material. Tr. 30.

At step five, the ALJ determined that, based on the testimony of the vocational expert, and considering Plaintiff's age, education, work experience, and RFC, Plaintiff was capable of making a successful adjustment to other work that exists in significant numbers in the national economy, including the jobs of office helper, storage rental clerk, and outside deliverer. Tr. 30-32.

11 The ALJ thus concluded Plaintiff was not under a disability within the
12 meaning of the Social Security Act from July 15, 2019, the application date,
13 through January 12, 2022, the date of the ALJ's decision. Tr. 32.

ISSUES

15 The question presented is whether substantial evidence supports the ALJ's
16 decision denying benefits and, if so, whether that decision is based on proper legal
17 standards. Plaintiff raises the following issues for review: (1) did the ALJ
18 properly evaluate the medical opinion evidence; (2) did the ALJ fail to properly
19 assess Plaintiff's RFC; (3) did the ALJ fail to consider as "severe impairments"
20 Plaintiff's migraine headaches and fibromyalgia; (4) did the ALJ fail to properly
21 evaluate the mental conditions affecting Plaintiff by failing to look at the record in
22 a longitudinal fashion; and (5) did the ALJ fail to meet his burden at step five.
23 ECF No. 13 at 2.

DISCUSSION

A. Plaintiff's Subjective Complaints

26 Although not mentioned in the “issues” section of Plaintiff’s opening brief,
27 ECF No. 13 at 2, a significant portion of Plaintiff’s briefing specifically challenges
28 the ALJ’s evaluation of her subjective complaints, ECF No. 13 at 17-21.

1 Defendant responds that the ALJ provided several legally sufficient reasons for
2 discounting aspects of Plaintiff's symptom testimony. ECF No. 19 at 10-19.

3 It is the province of the ALJ to make credibility determinations. *Andrews*,
4 53 F.3d at 1039. However, the ALJ's findings must be supported by specific
5 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
6 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
7 testimony must be "clear and convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9th
8 Cir. 1996). "General findings are insufficient: rather the ALJ must identify what
9 testimony is not credible and what evidence undermines the claimant's
10 complaints." *Lester*, 81 F.3d at 834; *Dodrill v. Shalala*, 12 F.3d 915, 918 (9th Cir.
11 1993).

12 In this case, the ALJ found Plaintiff's medically determinable impairments
13 could reasonably be expected to produce some of the alleged symptoms; however,
14 Plaintiff's statements concerning the intensity, persistence, and limiting effects of
15 those symptoms diminished the capacity for basic work activities only to the extent
16 to which they could reasonably be accepted as consistent with the objective
17 medical and other evidence of record. Tr. 23.

18 The ALJ first determined that the objective medical evidence did not support
19 the extent of Plaintiff's symptom allegations. Tr. 23. A lack of supporting
20 objective medical evidence is a factor which may be considered in evaluating an
21 individual's credibility, provided it is not the sole factor. *Bunnell v. Sullivan*, 947
22 F.2d 341, 345 (9th Cir. 1991); *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 883 (9th
23 Cir. 2006). Moreover, "[c]ontradiction with the medical record is a sufficient basis
24 for rejecting the claimant's subjective testimony." *Carmickle v. Comm'r Soc. Sec.*
25 *Admin.*, 533 F.3d 1155, 1161 (9th Cir. 2008). In assessing a Plaintiff's subjective
26 pain and symptom testimony, an ALJ may consider whether the alleged symptoms
27 are consistent with the medical evidence. *Lingenfelter v. Astrue*, 504 F.3d 1028,
28 1040 (9th Cir. 2007).

1 Plaintiff's briefing does not specifically address the ALJ's determination that
2 her statements were not fully consistent with the medical record. *See* ECF No. 13
3 at 18-21. The Court ordinarily will not consider matters on appeal that are not
4 specifically challenged in an opening brief, *Carmickle*, 533 F.3d at 1161 n.2, and
5 will not "manufacture arguments for an appellant," *Greenwood v. Fed. Aviation*
6 *Admin.*, 28 F.3d 971, 977 (9th Cir. 1994). Because the Court will not consider
7 claims that are not specifically and distinctly argued in an opening brief, any
8 contention that the ALJ erred by concluding that the objective medical evidence
9 did not support the severity of Plaintiff's alleged symptoms and limitations is
10 deemed waived. Nevertheless, as noted by the ALJ, treatment and examination
11 records contradict the degree of limitation alleged by Plaintiff in this case. Tr. 23-
12 25. Accordingly, the Court finds substantial evidence supports the ALJ's finding
13 that Plaintiff's subjective complaints were inconsistent with, and not fully
14 supported by, the objective medical evidence of record.

15 The ALJ also found that the routine and conservative treatment Plaintiff has
16 sought with respect to some of her allegedly disabling conditions contradicted her
17 subjective complaints. Tr. 26. Evidence of "conservative treatment" is sufficient
18 to discount a claimant's testimony regarding severity of an impairment. *Parra v.*
19 *Astrue*, 481 F.3d 742, 751 (9th Cir. 2007); *Johnson v. Shalala*, 60 F.3d 1428, 1434
20 (9th Cir. 1995) (conservative treatment suggests a lower level of both pain and
21 functional limitation).

22 As noted by the ALJ, during the relevant time period, Plaintiff engaged in no
23 mental health counseling, no specialized pain management (as opposed to
24 management by a generalist primary care provider), virtually no treatment for
25 fibromyalgia, virtually no treatment for migraines, and no neurology treatment or
26 emergent treatment for migraines or other conditions. Tr. 26. The ALJ stated,
27 "[t]he claimant testified at the hearing that she has health insurance and is able to
28 get whatever treatment she feels she needs, so the lack of treatment reflects that she

1 does not feel the need for treatment, which in turn shows her symptoms do not
2 actually trouble her to the extent she now alleges.” *Id.* Plaintiff, again, fails to
3 challenge the ALJ’s finding in this regard. *See Carmickle*, 533 F.3d at 1161 n.2.
4 In any event, the Court finds that Plaintiff’s routine and conservative treatment
5 during the relevant time period was a legitimate reason for the ALJ to discount her
6 claim of disabling symptomology.

7 The ALJ also indicated the record reflects Plaintiff had a limited work
8 history. Tr. 26. The Ninth Circuit has held that “poor work history” or a showing
9 of “little propensity to work” during one’s lifetime may be considered as a factor
10 which negatively affects a claimant’s credibility. *Thomas v. Barnhart*, 278 F.3d
11 947, 959 (9th Cir. 2002).

12 As noted by the ALJ, and reflected by the record, Plaintiff had virtually no
13 work history. Tr. 26. Plaintiff, again, fails to address the ALJ’s finding in this
14 regard. *See Carmickle*, 533 F.3d at 1161 n.2. The Court finds Plaintiff’s limited
15 work history was an additional valid reason, supported by substantial evidence, for
16 discounting Plaintiff’s subjective complaints in this case.

17 The ALJ additionally found that Plaintiff’s statements to providers were
18 inconsistent with her disability allegations. Tr. 26. In determining credibility, an
19 ALJ may engage in ordinary techniques of credibility evaluation, such as
20 considering claimant’s reputation for truthfulness and inconsistencies in claimant’s
21 testimony. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005); *Tonapetyan v.*
22 *Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). When a claimant fails to be a reliable
23 historian, “this lack of candor carries over” to other portions of his or her
24 testimony. *Thomas*, 278 F.3d at 959.

25 The ALJ specifically noted that despite claiming disabling symptoms, the
26 record reflects Plaintiff stated she was able to be more active and her pain was well
27 managed (Tr. 1865; September 2021); she requested that her surgeon increase her
28 lifting restrictions, showing she perceived herself to be capable of greater activity

1 (Tr. 1902; October 2021); she reported she had done well over the years but just
2 over the past few months had noticed worsening pain which was promptly
3 corrected with surgery (Tr. 2100-2101; September 2020); and her prior statement
4 to the agency indicated she could lift 20 pounds occasionally and sit, stand, and
5 walk 30 to 40 minutes at a time, consistent with the ALJ's RFC determination (Tr.
6 388; May 2020 Function Report). Tr. 26. The ALJ also noted Plaintiff reported
7 her anxiety was stable/under control with her current medications (Tr. 912
8 (October 2020); Tr. 921 (August 2020); Tr. 530 (October 2019)), and that Plaintiff
9 made very few reports of migraines to her providers, inconsistent with her hearing
10 testimony that she had two to three migraine headaches per month. Tr. 26.

11 Plaintiff has only challenged the ALJ's inconsistent statement findings with
12 respect to her reports of migraine headaches. ECF No. 13 at 15-16. Plaintiff
13 argues the record reflects multiple instances of reported headaches. *Id.* at 16
14 (citing Tr. 496, 549, 553, 832, 861, 867, 913 and 932).

15 Given the size of the record (over 2100 pages), directing the Court's
16 attention to only eight citations that reference headaches does not convince the
17 undersigned that the ALJ was wrong to interpret the record as having "very few
18 reports of migraines," especially since two of those reports merely reference that
19 Plaintiff took medication for headaches (Tr. 867, 932) and another report refers to
20 headaches that occurred in conjunction with a cough, sore throat and body aches
21 and ultimate diagnosis of a viral upper respiratory tract infection (Tr. 549, 551).

22 The Court finds that the weight of the record evidence supports the ALJ's
23 conclusion that Plaintiff's inconsistent statements also detracted from her overall
24 believability.

25 Finally, the ALJ also found Plaintiff's descriptions of her activities showed
26 greater functional ability than she alleged. Tr. 25. It is well-established that the
27 nature of daily activities may be considered when evaluating credibility. *Fair v.*
28 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). However, while the ALJ indicated

1 Plaintiff's allegations of total disability were inconsistent with her statements that
2 she cares for her children, cares for her hygiene needs, schedules her own medical
3 appointments, takes her medications independently, performs some household
4 chores independently, drives, shops and can accomplish her basic activities of daily
5 living within a reasonable amount of time, Tr. 25, the ALJ did not articulate in
6 what way these activities specifically conflicted with Plaintiff's testimony. *See*
7 *Fair*, 885 F.2d at 603 (one does not need to be "utterly incapacitated" to be
8 disabled); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir. 2001) ("[T]he mere
9 fact that a plaintiff has carried on certain daily activities, such as grocery shopping,
10 driving a car, or limited walking for exercise, does not in any way detract from her
11 credibility as to her overall disability."). The ALJ's finding that Plaintiff's
12 reported level of activity was inconsistent with her subjective complaints is not
13 supported.

14 Nevertheless, given the ALJ provided other valid reasons, supported by
15 substantial evidence, for finding Plaintiff less than fully credible, *see supra*, the
16 Court finds this error was harmless. *See Carmickle*, 533 F.3d at 1163 (upholding
17 adverse credibility finding where ALJ provided four reasons to discredit claimant,
18 two of which were invalid); *Batson v. Comm'r, Soc. Sec. Admin.*, 359 F.3d 1190,
19 1197 (9th Cir. 2004) (affirming credibility finding where one of several reasons
20 was unsupported by the record); *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th
21 Cir. 2008) (An error is harmless when "it is clear from the record that the . . . error
22 was inconsequential to the ultimate nondisability determination.").

23 The ALJ is responsible for reviewing the evidence and resolving conflicts or
24 ambiguities in testimony. *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir.
25 1989). It is the role of the trier of fact, not this Court, to resolve conflicts in
26 evidence. *Richardson*, 402 U.S. at 400. The Court has a limited role in
27 determining whether the ALJ's decision is supported by substantial evidence and
28 may not substitute its own judgment for that of the ALJ even if it might justifiably

1 have reached a different result upon *de novo* review. 42 U.S.C. § 405(g). After
2 reviewing the record, the Court finds that the ALJ provided clear and convincing
3 reasons, which are fully supported by the record, for finding Plaintiff's symptom
4 allegations were not entirely credible in this case.

5 **B. Nickerson Geneve, D.O.**

6 Plaintiff contends that the ALJ also erred by finding the opinion of Dr.
7 Geneve persuasive but not crediting all limitations he assessed at the administrative
8 hearing. ECF No. 13 at 12-14. Defendant responds that the ALJ reasonably
9 considered and evaluated the opinion of medical expert Geneve. ECF No. 19 at
10 20-24.

11 Dr. Geneve testified as a medical expert at the December 15, 2021
12 administrative hearing. Tr. 80-94. He opined that Plaintiff would be limited to
13 lifting 20 pounds occasionally and 10 pounds frequently, standing and walking for
14 one to two hours each (two to four hours total), and sitting for up to six hours with
15 upper extremity, postural and environmental limitations. Tr. 87. On cross-
16 examination, Dr. Geneve stated that, pre-surgery, Plaintiff's ability to carry out a
17 40-hour workweek at the light exertion level "could" be challenging. Tr. 89. He
18 indicated he did not see evidence of her orthopedic condition being exacerbated by
19 her fibromyalgia, but agreed fibromyalgia had the potential to exacerbate pain
20 levels. Tr. 89-90. Dr. Geneve indicated that the multi-level fusion of Plaintiff's
21 back would limit her ability to rotate, twist and bend. Tr. 91-92. However, he
22 opined Plaintiff would be limited to occasional for these activities, which he
23 described as up to 33% of the day. Tr. 92-93. Dr. Geneve agreed with Plaintiff's
24 counsel that Plaintiff's condition could potentially cause absenteeism, but he also
25 stated, "for me to tell you she would miss one or two days [per month] would be a
26 pure conjecture on my part." Tr. 94.

27 Contrary to Plaintiff's argument, ECF No. 13 at 13, Dr. Geneve did not
28 testify that Plaintiff's ability to carry out a 40-hour workweek at the light exertion

1 level, pre-surgery, “would” be challenging or that fibromyalgia “would”
2 exacerbate Plaintiff’s underlying spinal condition; he did not state that Plaintiff’s
3 ability to bend and twist would be “less than occasional;” and, with respect to
4 absenteeism, Dr. Geneve did not definitively state it would be possible for the
5 potential absenteeism to exceed 2 days per month, instead testifying that “for me to
6 tell you she would miss one or two days [per month] would be a pure conjecture on
7 my part,” Tr. 94. Plaintiff’s briefing misinterprets the hearing testimony of Dr.
8 Geneve.

9 The ALJ found Dr. Geneve’s testimony persuasive and adopted his assessed
10 limitations, Tr. 26-27, to find that Plaintiff was limited to light exertion level work
11 with the restriction of standing and walking for only 2 to 4 hours total in
12 combination in an 8-hour workday with the ability to stand and stretch at the
13 workstation for 1 to 2 minutes after every 30-40 minutes of sitting, as well as upper
14 extremity, postural and environmental limitations, *see* Tr. 22. Dr. Geneve did not
15 opine to any greater limitations than those assessed in the ALJ’s RFC
16 determination. The Court finds the ALJ’s RFC determination is consistent with
17 and supported by the testimony of Dr. Geneve.

18 **C. Severe Impairments**

19 Plaintiff next argues that the ALJ erred by failing to consider her migraine
20 headaches as a severe impairment at step two of the sequential evaluation process.
21 ECF No. 13 at 14, 15-16.¹ Defendant’s brief asserts that the ALJ considered

22 _____

23 ¹Although Plaintiff indicates in the “issues” section of her opening brief that
24 an issue for this Court to review is whether the ALJ erred by failing to consider
25 migraine headaches **and fibromyalgia** as severe impairments, ECF No. 13 at 2,
26 Plaintiff’s argument section does not address the ALJ’s step two determination
27 regarding fibromyalgia, ECF No. 13 at 11-25. Regardless, the ALJ found that
28 Plaintiff’s fibromyalgia was a severe impairment in this case. Tr. 17.

1 Plaintiff's migraine headaches and reasonably concluded this condition was not
2 severe. ECF No. 19 at 3-5.

3 Plaintiff has the burden of proving she has a severe impairment at step two
4 of the sequential evaluation process. 42 U.S.C. § 423(d)(1)(A); 20 C.F.R. §§
5 423(d)(1)(A), 416.912. In order to meet this burden, Plaintiff must furnish medical
6 and other evidence that shows she has a severe impairment. 20 C.F.R. §
7 416.912(a). Step two is “a de minimis screening device [used] to dispose of
8 groundless claims,” *Smolen v. Chater*, 80 F.3d 1273, 1290 (9th Cir. 1996), and an
9 ALJ may find a claimant lacks a medically severe impairment or combination of
10 impairments at step two when this conclusion is “clearly established by medical
11 evidence.” *Webb v. Barnhart*, 433 F.3d 683, 686-687 (9th Cir. 2005). Applying
12 the normal standard of review to the requirements of step two, the Court must
13 determine whether the ALJ had substantial evidence to find the medical evidence
14 clearly established Plaintiff did not have a severe impairment. *Yuckert v. Bowen*,
15 841 F.2d 303, 306 (9th Cir. 1988); *Webb*, 433 F.3d at 687.

16 The Court finds it significant that Plaintiff did not claim migraines or
17 headaches when asked on her disability report form to list “all of the physical or
18 mental conditions . . . that limit your ability to work.” See Tr. 297 (scoliosis,
19 skeletal dysplasia, and generalized anxiety were the only medical conditions listed
20 as affecting her ability to work). Nevertheless, her headaches were discussed at the
21 administrative hearing, Tr. 102-103, and the ALJ addressed headaches in his
22 decision, Tr. 17-18, 26.

23 As discussed above, Plaintiff only cited to eight reports in the over 2100-
24 page record that reference headaches. ECF No. 13 at 16 (citing Tr. 496, 549, 553,
25 832, 861, 867, 913 & 932). Therefore, it was not improper for the ALJ to interpret
26 the record as having “very few reports of migraines,” especially given that two of
27 the reports cited by Plaintiff merely reference that Plaintiff took medication for
28 headaches (Tr. 867, 932) and another report refers to headaches that occurred in

1 conjunction with a cough, sore throat and body aches and ultimate diagnosis of a
 2 viral upper respiratory tract infection (Tr. 549, 551). *See supra.*

3 Plaintiff's brief merely asserts that the ALJ "erred in failing to consider the
 4 migraine headaches as a 'severe limitation', and thereby fails to include the effect
 5 of the Plaintiff's headaches in the hypothetical presented to the VE." ECF No. 13
 6 at 14. However, "the mere existence of an impairment is insufficient proof of a
 7 disability." *Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir. 1993); *Edlund v.*
 8 *Massanari*, 253 F.3d 1152, 1159-1160 (9th Cir. 2001) (a claimant must prove an
 9 impairment affects his ability to perform basic work activities). Plaintiff has failed
 10 to specify any functional limitations from headaches that were not accounted for
 11 by the ALJ.² Accordingly, any error the ALJ may have made in failing to find
 12 migraines as a severe impairment at step two was harmless. *See Lewis v. Astrue*,
 13 498 F.3d 909, 911 (9th Cir. 2007) (ALJ's failure to include impairment as severe at
 14 step two was harmless error where ALJ considered the limitations posed by the
 15 impairment at step four); *Johnson*, 60 F.3d at 1436 n.9 (an error is harmless when
 16 the correction of that error would not alter the result); *Burch*, 400 F.3d at 679 (an
 17 ALJ's decision will not be reversed for errors that are harmless).

18 The Court finds substantial evidence supports the ALJ's determination that
 19 headaches/migraines did not present greater than minimal limitations on Plaintiff's
 20 ability to perform basic work activities. Tr. 17-18.

21 **D. Mental Health Limitations**

22 Plaintiff next argues that, considering the ALJ's finding that Plaintiff had a
 23 "moderate" impairment in concentration, persistence and pace and Dr. Genthe's
 24 statement that Plaintiff cannot maintain focus and concentration for more than
 25

26 ²The ALJ expressly accounted for Plaintiff's headaches/migraines in the
 27 RFC assessment by limiting Plaintiff to work involving no more than moderate
 28 noise levels. Tr. 18, 22.

1 short periods, the ALJ erred by failing to include these specific mental health
2 limitations in the RFC determination and hypothetical to the vocational expert.
3 ECF No. 13 at 17. Defendant responds that the ALJ adequately accounted for
4 Plaintiff's moderate mental limitations by restricting her to a range of simple and
5 routine work. ECF No. 19 at 5-10.

6 Plaintiff is correct that the ALJ determined Plaintiff had moderate
7 limitations in understanding, remembering or applying information and with regard
8 to concentrating, persisting, or maintaining pace. ECF No. 13 at 17 referencing Tr.
9 19-20. However, the ALJ specifically and adequately accounted for these
10 moderate mental limitations by restricting Plaintiff to the performance of simple,
11 routine tasks. Tr. 20, 21, 22. As Defendant points out, ECF No. 19 at 6-7, this is
12 consistent with Ninth Circuit case law which held that an ALJ adequately
13 incorporated pace and other moderate mental limitations into an RFC by restricting
14 the claimant to simple tasks. *See Stubbs-Danielson v. Astrue*, 539 F.3d 1169, 1174
15 (9th Cir. 2008) (finding an ALJ's assessment of a claimant adequately captures
16 restrictions related to concentration, persistence, or pace where the assessment is
17 consistent with restrictions identified in the medical testimony).

18 Plaintiff also argues that the ALJ failed to address Dr. Genthe's statement
19 that Plaintiff cannot maintain focus and concentration for more than short periods.
20 ECF No. 13 at 17. Plaintiff argument is without merit.

21 Dr. Genthe, a state consultative examiner, opined that Plaintiff was likely
22 able to understand, remember and carry out short, simple instructions; likely able
23 to maintain attention and concentration for brief periods of time, but unlikely for
24 extended periods of time; likely able to perform simple work-like activities at a
25 consistent pace; and able to maintain a regular work schedule and complete a
26 normal 40-hour work-week. Tr. 477.

27 The ALJ found Dr. Genthe's opinion only "partially persuasive," indicating
28 that some elements of the opinion (specifically the opinion that she was unlikely

1 able to maintain attention and concentration for extended periods of time) were
2 stated in such vague terms as to be of little assistance. Tr. 28. Plaintiff did not
3 specifically challenge the ALJ's determination that Dr. Genthe's opinion was only
4 "partially persuasive." *See Carmickle*, 533 F.3d at 1161 n.2 (the Court will not
5 ordinarily consider matters on appeal that were not specifically and distinctly
6 argued in a party's opening brief).

7 The Court finds that ALJ adequately accounted for Plaintiff's mental health
8 limitations by restricting her to simple and routine tasks. This determination is
9 supported by the evidence of record and free of error.

10 **E. Longitudinal Record**

11 Without elaboration, Plaintiff additionally argues that the ALJ erred by
12 failing to consider the evidence in a longitudinal fashion. ECF No. 13 at 23-24.
13 The Court finds this argument is also without merit.

14 Other than asserting that the ALJ "has not taken a longitudinal approach,"
15 ECF No. 13 at 24, Plaintiff has presented no evidence to support the assertion or
16 otherwise demonstrate the ALJ's error in this regard. The Court agrees with
17 Defendant, ECF No. 19 at 15-16, that the ALJ viewed the record longitudinally in
18 assessing Plaintiff's RFC and reasonably chose examples representative of a
19 broader development, *see* Tr. 22-30.

20 **F. Step Five**

21 Plaintiff contends the ALJ erred at Step Five because the jobs identified by
22 the vocational expert would be eliminated if the ALJ's RFC determination
23 reflected all of the limitations Plaintiff has alleged. ECF No. 13 at 21-23.
24 Defendant asserts the ALJ's RFC determination is supported by substantial
25 evidence.

26 At Step Five, "the Commissioner has the burden 'to identify specific jobs
27 existing in substantial numbers in the national economy that [a] claimant can
28 perform despite [his] identified limitations.'" *Zavalin v. Colvin*, 778 F.3d 842, 845

1 (9th Cir. 2015) (quoting *Johnson*, 60 F.3d at 1432). The Commissioner considers
 2 the claimant's RFC, age, education, and work experience in order to determine if
 3 the claimant is able to perform a job in the national economy. 20 C.F.R. §
 4 416.920(a). The ALJ may also rely on the testimony of a vocational expert for
 5 information on what occupations a claimant can perform given his or her RFC. 20
 6 C.F.R. § 416.966(e); *Valentine v. Comm'r Soc. Sec. Admin.*, 574 F.3d 685, 689
 7 (9th Cir. 2009).

8 Plaintiff has not demonstrated that the ALJ erred with respect to his analysis
 9 of the medical opinion evidence of record or that the ALJ's RFC determination
 10 lacks support. *See supra*. The Court thus finds the ALJ's RFC determination is
 11 supported by substantial evidence in this case.

12 At the administrative hearing, the vocational expert testified that with the
 13 RFC assessed by the ALJ, Plaintiff retained the capacity to perform a significant
 14 number of jobs existing in the national economy, including the positions of office
 15 helper, storage rental clerk, and outside deliverer. Tr. 109-111. Since the
 16 vocational expert's testimony was based on a properly supported RFC
 17 determination by the ALJ, the Court finds the ALJ did not err by relying on the
 18 testimony of a vocational expert at step five of the sequential evaluation process.
 19 Tr. 30-32.

20 CONCLUSION

21 Having reviewed the record and the ALJ's findings, the Court finds the
 22 ALJ's decision is supported by substantial evidence and free of error.

23 Accordingly, **IT IS HEREBY ORDERED:**

24 1. Defendant's motion to affirm the decision of the Commissioner, **ECF**
 25 **No. 19**, is **GRANTED**.

26 2. Plaintiff's motion to reverse, **ECF No. 13**, is **DENIED**.

27 3. The Commissioner's final decision is **AFFIRMED**.

28 ///

1 **IT IS SO ORDERED.** The District Court Executive is directed to file this
2 Order and provide a copy to counsel for Plaintiff and Defendant. **Judgment shall**
3 **be entered for DEFENDANT and the file shall be CLOSED.**

4 DATED October 24, 2023.



5 A handwritten signature in blue ink that reads "Alexander C. Ekstrom".
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7 ALEXANDER C. EKSTROM
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UNITED STATES MAGISTRATE JUDGE